85-2087

Supreme Court, U.S.
FILED
JUN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROBERT JOHN BRADY, Petitioner,

v.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

ROBERT JOHN BRADY
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Filed June, 1986

11 cp

QUESTIONS PRESENTED

1. Does the intention of Congress, expressed in title 20 of the United States Code and title 34 of the Code of Federal Regulations, govern contract claims arising under the National Defense Student Loan Program, involving the disbursement of largely federal funds, under the supremacy Clause of the United States Constitution, Article VI, Clause 2, by federal statutory preemption of a state cause of action?

2. Does the broad verbal prouncement of Western Union Tel. Co. v. Pennsylvania, 368 US 71, 75-77 (1961) embrace state court proceedings, including a court supervised mandatory setlement conference, as violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, where the absentee who s not bound is William J. Bennett, United States

Secretary of Education acting under educational assistance programs?

3. Does a state statute, California Code of Civil Procedure § 389, which was substantially revised to conform to Rule 19 of the Federal Rules of Civil Procedure, require dismissal of the cause of action based upon the absence of an indispensable party, William J. Bennett, United States Secretary of Education, as joint obligee under a governmental from contract who from the sidelines, publicly threatens federal self-help measures?

4. Does the imposition of sanctions for an attempt to join William J. Bennett, United States Secretary of Educatin as a plaintifff, followed by the breach of a judicially created fiduciary relationship, in the context of a mandatory settlement conference, which effectively suppressed an appeal of those sanctions, represent a

subterfuge to evade consideration of federal issues?

(NOTE: Petitioner resees the right to argue Question 5 in the event certiorari is granted on any of the above question but does not include Question 5 among the reasons for the grant of certiorari.)

5. Does the implicit refusal by state trial and appellate courts to take any meaningful action on requested judicial notice of federal statutes and regulations require an explicit reaction from this Court to assure fair trials in state courts of federal questions under 44 USC § 1507 and the principles of Ohio Bell Tel Co. v. Public Utilities Com., 301 US 292 (1937)?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Robert John Brady and the respondents, the Court of Appeal of California, Fourth Appellate Distict, Division One; the superior Court of California, County of San Diego; the Municipal Court of California, County of San diego, San Diego Judicial District; United States International University; Mulligan, Ezell and Sayre; Knox Attorney Service Inc.

The list of parties to the instant proceeding is identical to the list of parties to the proceedings below.

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APPENDIX (A) Summary Order of the Supreme Court of California; (B) Summary Opinion of the Court of Appeal of California Fourth Appellate District, Division One; (C) Minute Order and Subsequent Judgment of the Superior Court of California, County of San Diego; (D) Superior Court of California, County of San Diego, writ of certiorari; (E) Decisions of the Municipal Court of California, San Diego County, San Diego Judicial District: Exparte Conference, Mandatory Settlement Conference, Motion for Joinder, Motion for Compulsory Cross Complaint, Motion for Further Bill of Particulars; (F) Constitutional Provisions, Statutes and Regulations Involved:

United States Constitution, Art. VI, Clause 2, United States Constitution Amendment XIV, Sectionl, 20 USC 425(b)(2) 28 USC §§ 1345, 1356, 44 USC § 1507, California Code of Civil Procedure §§ 128.5, 389, 632, 634, P.L. 92-318, Part E, Sec. 464(c)(1)(C), 34 CFR 674.2, 674.31, Rule 19, Federal Rules Civil Procedure; (G) Notice of Motion for Further Bill of Particulars and to Preclude Evidence Filed May 30, 1985; (H) Declaration of Robert John Brady in support of Motion to File Compulsory Cross-Complaint and to Remove Case from Civil Active Lists Filed July 5, 1985; (I) Memorandum of Points and Authorities in Support of Motion for Order Compelling Joinder of William J. Bennett, United States Secretary of Education Filed August 16, 1985; (J) Request for Statement of Division, superior Court of California, County of San Diego, filled January 14, 1986; (K) An Excerpt, Item 5(a) and (b),

pp. 14-16, of the Petition for Writ of Prohibition and/or Mandamus and/or Writ of Certiorari or Other Relief with Memorandum of Points and Authorities in the Court of Appeal of the State of California, Fourth Appellate District, Division One, Filed February 4, 1986; (L) An Excerpt, Item II, pp. 53-55, of the Petition for Writ of Prohibition and/or Mandamus and/or Writ of Certiorari or Other Relief with Memorandum Points and Authorities in the Supreme Court of the State of California Filed February 28, 1986.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROBERT JOHN BRADY, Petitioner,

v.

SUPREME COURT OF CALIFORNIA, COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, MUNIICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT; UNITED STATES INTERNATIONAL UNIVERSITY; MULLIGAN, EZELL & SAYRE, KNOX ATTORNEY SERVICE INC., Respondents.

PETITION FOR WRIT OF CERTIORAR; TO THE SUPREME COURT OF CALIFORNIA

The petitioner Robert John Brady respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California, entered

in the above entitled proceeding on March 12, 1986.

OPINIONS BELOW

The judgment of the Supreme Court of California has not been reported, it is reproduced in the appendix hereto, a-4, infra.

The judgment summary opinion of the Court of Appeal, Fourth Appellate District, Division One has not been reported, it is reproduced in the appendix hereto, a-5, infra.

The judgment and prior minute order of the Superior Court of California, County of San Diego has not been reported. It is reproduced in the appendix hereto, a-6, infra.

The judgment, minute orders and memorandum decision of the Municipal Court of California, County of San Diego, San Diego Judicial District, have not been reported, they are reproduced in the appendix

they are reproduced in the appendix hereto, a-15, infra.

JURISDICTION

The judgment of the Supreme Court of California was entered on March 12, 1986, denying petitioners petition for writ of prohibition and/or memorandas and/or writ of centiorari or other relief filed February 28, 1986. The jurisdiction of this Court is involved under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent text of the Constitutional provisions, statutes and regulations cited below is set forth verbatim in the appendix hereto at the pages indicated:

United States Constitution, Art. VI, Clause 2, Supremacy Clause, a-22, infra;

United States Constitution, Amendment XIV,

Section, a-22, infra; P. 4, 92-318, title I, Part E, § 464(c)(1)(C), terms of loans, a-31, infra; 20 USC §425, terms of loans, a-23, infra; 28 USC § 1345, United States as plaintiff, a-23, infra; 28 USC §1356, Seizures not within admiralty and maritime jurisdiction, a-24, infra; 44 USC § 1507, Judicial notice, a-24, infra; California code of Civil Procedure (CCP) § 128.5, Frivolous actions or delaying tactics, a-24, infra; CCP § 389, Joinder as party, a-26, infra; CCP § 632, statement of Decision, a-29, infra; CCP § 634, Omission or Ambiquity brought to attention of trial court, inference, a-30, infra; 34 CFR 674.2, Definitions, a-31, infra; 34 CFR 674.32, Promissory note-loan repayment, a-33, infra; FRCP, Rule 19, Joinder of Persons Needed for Just Adjudication, a-33, infra.

STATEMENT OF THE CASE

This is a case involving small claims

jurisdictional amounts based upon a 1970 promissory note under the National Defense Student Loan Program.

The plaintiff, United States International University, filed a standard contractual debt action in the Municipal Court of California, San Diego County, San Diego Judicial District on February 9, 1983, No. 335178. The action appears to be a state cause of action except for an Exhibit A which is a copy of a promissory note entitled, Department of Health, Education and Welfare, Office of Education, Washington, D.C., Promissory Note, National Defense Student Loan Program, Bureau of Higher Education. The record is devoid of any explicit mention of the Federal nature of the cause of actionby the plaintiff or any of the California Courts. The petitioner has presented the Federal cause of action explicitly and implicitly at every stage and at every

opportunity in the proceedings.

An oblique reference to the Federal cause of action waa reluctantly made by the plaintiff in a response for a demand for bill of particulars filed May 17, 1983 by a document which incorrectly cited the Code of Federal Regulations. The petitioner filed a general denial with an affirmative defense of the statute of limitations on May 20, 1983. A two year hiatus then occurred in the case as the result of plaintiff's representations.

A notice of motion for further bill of particulars was filed by the petitional on May 30, 1985 as the result of a request for admission served by the plaintiff on May 7, 1985 which is not a part of the record. The petitioner sought explanation of six Federal Questions which appeared to exist in the complaint and included a request for judicial notice of certain Federal statutes and regulations.

(362-377). The motion was denied summarily on June 25, 1985 as untimely. (351).

A notice of motion for leave to file compulsory cross complaint after answer was filed by the petitioner on July 5, 1985. (332-346). Exhibit A of this document is a proposed cross complaint against cross-defendant William J. Bennett, United States Secretary of Education for declaratory relief. A separate request for judicial notice was included. Petitioner indicated his understanding of the Federal nature of the cause of action in the motion papers and referred to additional Federal statutory law. The motion was denied as untimely on August 5, 1985. (316, 319).

On a motion for order compelling joinder as plaintiff of William J. Bennett, United States Secretary of Education was filed on August 16, 1985. Included was a separate request for judicial notice

with statutes and regulations (129-315). The on-going nature of the Federal pecuniary interest in the cause of action was vividly demonstrated by the inclusion of the request for judicial notice of several threatening editorials and cartoons from local newspapers. The motion was denied September 10, 1985 and sanctions of $300 were imposed for bringing the motion. Just as there was no transcript of the proceedings as timely requested, there was no record made of judicial notice of the documents which was granted immediately before denying the motion and imposing sanctions.

A notice of appeal to the Appellate Department of Superior Court was filed by the petitioner on September 8, 1985 directed at the imposition of sanctions and all related issues.

Following an at-issue memorandum of the plaintiff, and a demand for jury trial

in response thereto by the petitioner, a court supervised mandatory settlement conference was held on October 23, 1985. the Supreme Court of California has failed to correct the manner in which the settlement conference was conducted by the Municipal court including the creation and breach of a fiduciary relationship, the fraudulant elimination of a hold harmless agreement, the failure to have a court reporter to record the results in accordance with local rules, and the blatant attempt to increase an agreed al-inclusive $600 amount by the imposition of plaintiff's attorney's fees upon the petitioner. This posture of the Municipal Court was discovered during and after an exparte conference called by the petitioner on November 6, 1985. Petitioner had been presented a ridiculous release prepared by a nonlawyer contrary to the essence of the settlement agreement.

The action of the Municipal Court of October 23, 1985 was recorded as a judgment following the exparte hearing. Such 'judgment' was entered without notice and hearing. It was upon this "judgment" of October 23, 1985 that the petitioner sought extraordinary relief from the Superior Court of California, San Diego County, by a petition for writ of prohibition and/or mandamas and/or writ of Certiorari and/or other relief, No. 553696, on November 25, 1985. (523-591). Respondent was the Muniiipal Court.

A writ of certiorari issued (476-479) on that date from the Superior Court bringing the entire record in the case before the Superior Court. (1-409). A determination also was made that there was no appeal from the decision of the Municipal Court of October 23, 1985. (414:6-7). Seven weeks later On January 16, 1986, a Superior Court Judge discharged the writ.

This action effectively denied the Federal Questions inthe case including the joinder of william J. Bennett, United States Secretary of Education, extensive "findings" in a requested statement of decision timely filed, and a request for judicial notice, all related to the Federal cause of action. Thereby the Supremacy Clause, Art. VI, Clause 2, of the United States Constitution and the Due Process Clause of the Fourteenth Amendment were again ignored.

A petition for writ of prohibitions and/or mandamus and/o writ of Certiorari or other relief was filed in the Court of Appeal, Fourth Appellate District, Division One, No. D004173, on February 4, 1986. Respondents were the superior Court and the Municipal Court. Included therein at the commencement of item five, the following statement appears:

Respondents have determined that

> they have jurisdiction to entertain, hear and determine the above-mentioned motions, actions and proceedings. the Municipal Court threatens to entertain, hear and determine the "motion for order compelling the enforcement of compromise and settlement agreement, and judgment thereon and request for sanctions." (5-25). with the Superior Court's decision, the Municipal Court will undoubtedly move ahead. (410). The judgment and action threatened to be taken by the Municipal Court are without or are in excess of jurisdiction of either of the respondents, and in violatin of Consitiutional, statutory and precedential mandates such as Article VI, Clause 2 of the Untied States Constitution, the Fourteenth Amendment to the United States Constitution, CCP Sec. 389.

The petition was denied on February 18, 1986 "as there is no showing any relief is warranted."

A petition for writ of prohibition and/or mandamus and/or writ of certiorari or other relief was filed with the Supreme Court of California on February 28, 1986. Respondents were the Court of appeal, the Superior Corut and the Municipal Court.

On page 27, the following comment was made:

> "(P)etitioner thinks that besides the jurisdictional issues which the Courts have not given any meaningful attention to there are federal questions in this case which the United States Supreme Court should have the opportunity to examine. It is respectfully submitted they will not take kindly to a state court which imposes sanctions for asserting rights derived from federal law and then covers it up with a rigged settlement conference."

An application for stay was denied and the petition for writ of prohibition/ mandate was denied on March 12, 1986.

With an opinion to work from or any mention of the federal nature of the cause of action, although four levels of state courts have been involved the petitioner has a difficult task complicated by a purported settlement. The pervading problem throughout the litigation has been the enormous power of the nonparty, William J. Bennett, United States Secretary of

Education. The enforcement of federal law and regulations is relegated to private attorneys whose fees are based upon suppression of the federal cause of action so that the federal government is not bound by res judicata.

It is respectfully submitted that state procedural rules are being abused to achieve this result. An example is California Code of Civil Procedure § 389(c) based upon Federal Rule of Civil Procedure, Rule 19(c). Ignoring the requirements of this section is per se fraudulant especially when it allows the imposition of sanctions as it did in this case and rovides the basis of most of the litigation expenses.

The policies and practices of the United States, in regard to civil enforcement of student loans, are determinative of the manner in which this case goes forward. Statutes such as 28 USC §§ 1345

and 1346 are necessarily a part of such policies and practices. One provision preserves the position of the attorney general as the chief legal officer of the United States except when such duties are placed in other hands, the other places exclusive jurisdiction, in suits involving seizures by the United States, in federal courts.

The statute of limitations bars the instant action of the face of the pleadings with judicial notice of the minimum monthly payment statute and the definition of default as set forth n the regulations of the Department of Education. This issue is not one the state courts want to definitively determine and no doubt contributes to the present posture of this case.

Intimidation was first introduced in this case by the plaintiff attorney's motions for sanctions directed at

petitioner's efforts to have the Municipal Court take cognizance of federal questions. It increased with the policy of ignoring requests for judicial notice and a court reporter. The granting of sanctions on September 10, 1985 made the intimidation explicit on the part of the Municipal Court.

Intimidation carried-over to a court supervised mandatory settlement conference on October 23, 1985. By means of an offer from the Judge, given in confidence to the petitioner, which no reasonable lawyer could refuse to avoid litigation expense, the Municipal Court was able to achieve a settlement and, in effect, subvert federal law. the Municipal Court had created a fiduciary relationship and shortly thereafter breached a fiduciary duty by entering terms different from the agreed upon and omitting the key provision, a hold harmless agreement. Thes terms were

entered by the Court without notice or hearings in violation of local rule, no court reporter recorded the results of the settlement conference. By means of the "settlement" the Municipal Court was able to destroy petitioner's appeal of his sanctions. Also, he probably was laying the groundwork for awarding attorney's fees to plaintiff's attorney, contrary to the terms of settlement which included an all-inclusive sum of $600 with each side picking up their own costs and attorney's fees. Petitioner was informed the sanctions would be eliminated with the penalty include din the settlement sum. Petitioner's appeal sought to expurge the record of this judicial action. The Municipal Court policy on student loan cases was thereby to remain free of effective challenge. No reasonable attorney could stant still for this kind of adjudication.

Petitioner's hearing on a writ of

certiorari in the superior Court on January 16, 1986 amounted to a rubber stamp approval of the Municipal Court action. Federal parties, statutes, and regulations were unwelcome guests in this forum. The hearing was abbreviated in the extreme and the threats of further sanctions was implicit in every word from the bench.

There are by some estimates 10,000,000 students and former students in default, as that term is defined in the code of theFederal Regulations, on government student loans. Newspaper reports indicate that there are $24 billion in outstanding debts owed to the federal government and that some 750,000 former students' names have been turned over to the Internal Revenue Service to confiscate tax refunds. The state courts close their eyes to the potential of such developments which have occurred during the last few years.

Judicial notice will reveal the absence of meaningful annotations in these matters involving millions of our citizens and billions of American dollars. It is for this reason petitioner should be awarded costs and attorney's fees by this Court for pursuing this matter against great adversity and almost hopeless odds.

The present posture of this case lies in an area of contract and judgment resulting from the purported settlement. Thus far, there is no Court which thinks there is any need for the Federal government to be involved.

The judiciary "trusts" the Federal government not to abuse res judicata.

Petitioner considers the complaint a fraud in not naming William J. Bennett, United States Secretary of Education; the proceedings a shame in not recognizing Federal law and regulations; and the purported settlement a misrepresentation

which is fraud in California. This situation was compounded by the terms which the Court entered as the settlement terms without notice and hearing. No reasonable attorney could refuse the settlement terms as presented to the petitioner in light of litigation expense, and no reasonable attorney could stand still for what has occurred since that time in the California Courts.

Trust us is what nonparty William J. Bennett, United States Secretary of Education is asking of the petitioner and millions of others. Meanwhile the Internal Revenue Service threatens nonjudicial seizures at the behest of the nonparty.

The highest state Court in California assumed that substantial Federal Questions were properly before it and proceeded to consider and dispose of those issues by its denial of a discretionary writ in its original jurisdiction. The entire record

was before the Supreme Court of California in which each of the Federal Questions briefed were raised in the Municipal Court. The judgment terminated an original proceeding which determined the jurisdiction of lower State Courts finally and which was determinative of the litigation.

How the Federal Questions Were Presented

Judicial notice of federal constitutional provisions statutes and regulations have been sought at each stage and in each forum of these proceedings. See two typical statutes, e.g., P.L. 92-318 (January 3, 1972) and 34 CFR 674.2 (46 FR 5241, Jan. 19, 1981).

In a notice of motion for further bill of particulars and to preclude evidence filed May 30, 1985, it was indicated that the bill or particulars which was filed was defective because Federal questions appear to exist under the minimum

repayment rates; as to what constitutes acceleration; as to the definition of default; as to penalties for concealing material information, as to the amount of interest subsidy payments; and as to the disclosures to be made to borrowers. (362-377). See a-37, infra.

In petitioner's memorandum of ponts and authorities in support of motion for leave to file cross complaint after answer is filed and to remove case from civil active list filed July 5, 1985, a request for judicial notice of the above material was repeated. The plaintiff's response to the demand for bill of particulars dated May 16, 1985 further indicated the Federal cause of action. Petitioner's declaration in support of motion for further bill of particulars and to preclude evidence filed May 30, 1985 included statements such as "a satisfactory bill is necessary to enable the defendant to prepare his

defenses and to understand the issues of federal law raised by the plaintiff in its complaint." See a-38, infra Attached petitioner's filings of July 5, 1985 was a cross-complaint seeking declaratory relief against cross-defendant William J. Bennett, United States Secretary of Education to avoid a separate action to declare the rights and duties of the respective parties. (332-346).

A motion for order compelling joinder of William J. Bennett, United States Secretary of Education was filed on august 16, 1985. (129-315). See a-39, infra. A request for judicial notice of Federal statutes and regulations applicable to direct student loans by including copies of some 150 pages of such provisions. the memorandum of points and authorities at pp. 12-13 gave the specific language of Article VI, Clause 2 and Amendment XIV, Clause 1 of the United States Constitution

and stated:

> These two provisions of the United States Constitution will govern this case n its bottom line. Whether the judge be trial or appellate, federal or state, or the case be summary or protracted, the defendant hereby makes a continuing objection to these proceedings based upon these controlling constitutional provisions."

The federal questions raised in the Municipal Court were renewed in the Superior Court. The request for statement of decision included 109 points. See, e.g. a-41, infra. The brief in the Court of Appeal kept the issues alive. See, e.g. a-46, infra. And the brief in the Supreme Court of California enunciated the same issues. See, e.g. a-49, infra.

REASON FOR GRANTING THE WRIT

I.

Laws enacted in pursuance of the federal Constitution are given supreme status by the terms of the Constitution itself; by ignoring the constitutional mandate, the California Supreme Court has divided an important question of federal law in conflict with applicable decisions of this court.

To this time there has been no meaningful interpretation of the nature of rights and obligations created under the National Defense Student Loan Program and regulations promulgated thereunder. The Supreme Court of California had the opportunity but they choose not to fill this void perhaps because the legislation was basically federal.

The Municipal Court of California, San Diego County, San diego Judicial District's policy of handling student loan cases as solely state causes of action was approved by every level of court in

California. It is respectfully submitted that such a policy is in derogation of federal laws.

Federal standards prevail in educational assistance programs. Law v. Nichols, 414 US 563 (1974). Clear and emphatic federal policies are involved in the National Defense Student Loan Program. Cf. D'Oench, Duhne & Co., Inc. v. Federal Deposit Insurance Corp., 315 US 447 (1942); Federal Crop Ins. Corp. v. Merrill, 33.2 US 380 (1947).

It is clear that if an act of congress prescribes a duty and also expressly provides a right of action for breach of that duty, the action "arises under" federal law. Dice v. Akron, C.&Y. R.R., 342 US 359 (1952). Congress has expressed a compelling federal interest in the National Defense Student Loan Program in providing for a duty and breach of that duty under the relevant statutes and

regulations. A compelling federal interest in a state diversity case made the determination of fraud a matter of federal law in Yiatchos v. Yiatchos, 376 US 306, 307-309, (1964).

State courts have both the power and the duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction. Clafin v. Houseman, 93 US 130 (1876); Second employer's Liability Cases, 223 US 1 (1912); Testa v. Katt, 330 US 386 (1947). The fact that Congress has given the federal courts exclusive jurisdiction in suits involving seizures (28 USC § 1356) cannot excuse the state courts disposition to avoid any mention of federal parties, law or regulations in this case. An informed view of the effect of this law on student loan cases would be enlightening.

The manner in which Art. VI, Clause 2

or the United States Constitution was avoided in the state courts can only be explained as an evasion. See Rogers v. Alabama, 192 US 226, 230-231 (1904). To achieve this result required the discriminatory application of state court rules. Hartford Life Ins. Co. v. Johnson, 249 US 490, 493 (1919); Wolfe v. North Carolina, 364 US 177, 195 (1960). A required court reporter was conspicuously absent in the Municipal Court proceedings. A statement of decision, which was timely requested in the Superior Court, was disregarded. It is respectfully submitted that liability on a note is a federal question and is not governed by the law of the forum state or the state where the note was executed. Certain areas are so "... dominated by the sweep of federal statutes that legal relations which they effect must be deemed governed by federal law ...." Sola Elec. Co. v. Jefferson Elec. Co., 317 US 173,

176 (1942). rights and liabilities of the United States cannot be permitted to vary with the laws of the several states when there are important federal laws involved. United States v. Little Lake Misere Land Co., 412 US 580 (1973). Federal rules of contract construction preempt state contract rules which are employed to determine the meaning of promissory notes subject to federal regulation.

If federal law would be applied were the United States prosecuting on defending an action, federal law should normally be applied if an agent on instrumentality of the United States is suing or being sued. D'Oench, Duhne & Co., Inc. v. Federal Deposit Insurance Corp., 315 US 447 (1942). Federal issues are so central to the instant controversy that any state grounds are precluded. Federal issues predominate. It should be noted that construction of federal law necessarily

involves construction of the regulations thereunder. United States v. Mersky, 361 US 431, 437-438 (1960).

The Supreme Court of California's decision to decide important questions of federal law in this case is final and will be unaffected and undeluted by later proceedings if they should occur. See Radio Station WOW v.-Johnson, 326 US 120, 124-127 (1945).

II.

> Western Union affirmed that no Court can render a judgment affecting property to which conflicting claims are made unless it can do so in such a way as to bind all significant claimants to the property. However the Supreme Court of California decided an important federal question in this case which has not been, but should be, settled by this Court in deference to the Fourteenth Amendment. Due Process Clause.

In

Western Union Tel. Co. v. Pennsylvania, 368 US 71, 75 (1961), the objection

sustained was that the private obligor should not be subjected to double liability, not that non-party states would be prejudiced by a determination made in their absence. This Court in Western Union stated that if the effect of fragmented adjudications was to subject a defendant to the risk of paying the same debt more than once, there would be a taking without due process, 368 US at 76, 77.

It is respectfully submitted that it is an essential element of due process that the court before whom the parties are appearing has the power to assure the defendant that once a judgment is rendered he will not be subjected to double or multiple liability in another court. If the court cannot provide this assurance, and an alternative forum exists where all the interested parties can be joined, then the suit must be dismissed on the

defendant's motion even though all other jurisdictional prerequisites are met.

Western Union seemed to affirm that no court can render a judgment affecting property to which conflicting claims are made unless it can do so in such a way as to bind all significant claimants to property. To this time little recognition has been given to multiplicity suits in joinder of plaintiffs. Western Union logically covers the facts of this case. The federal government should be treated no differently than other states. The petitioner, just as Western Union is entitled to a forum where all claims could be resolved in this case 368 US at p. 80. As this Court has held, if personal jurisdiction is not obtained over such parties, the defendant may suffer having to pay twice. New York Life Ins. Co. v. Dunlevy 241 US 518 (1916).

Private parties may settle their

controversies at any time, and rights which a plaintiff may have had at the commencement of the action may terminate before the judgement is obtained or while the case is on appeal, and in any such case the Court, being informed of the facts will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public because the state courts have endevored to render a judgment in the absence of William J. Bennett, United States Secretary of Education. See United States v. trans-Missouri Freight Assoc., 166 US 290, 309 (1897).

The Fourteenth Amendment is a restraint on the judicial department of the state. Barrows v. Jackson, 346 US 249 (1953). It is respectfully submitted if the case cannot be completely decided, the court should make no decree. Shields v. Barrow, 58 US (17 How.) 130, 141-142

(1854). This is especially true since the government is not technically bound by res judicata unless it has properly been made a party to the state court proceedings, Cheng Yih-Chun v. Federal Reserve Bank of New York, 442 F 2d 460 (2d Cir. 1971).

Joinder of William J. Bennett, United States Secretary of Education is constitutionally compelled. Sovereign immunity has been waived. See R.F.C. v. J. G. Menihan Corp., 312 US 81 (1941).

III

In construing and applying California Code of Civil Procedure § 389, the Supreme Court of California decided that a state court can proceed without an absentee, who is indispensable, because the court has jurisdiction of the existing parties and therefore has power to make a judgment affecting their interests, thereby deciding an important question of federal law based upon Federal Rule of Civil Procedure, Rule 19 which has not been but should be settled by this Court.

In Provident Tradesmens Bank & Trust

Co. v. patterson, 390 US 102 (1968) this Court responded to a serious challenge to a newly amended Rule 19. The direct concern was 19(b) and the reasons for a finding of indispensability.

Since the amendment of Rule 19, determinations involving contractical relationships, classified as "joint," "united," and "separable" interests, have for the most part been based upon the criteria of Rule 19(a).

It is said that determining whether a party is indispenable requires the careful exercise of judicial discretion on a case-by-case basis. Rule 19(b) recommends a four-part test. Provident discusses additional relevant concerns. The first factor of subdivision b's four factors is the test long used by the courts in determining indispensability: prejudicial effect of judgment. The test for prejudice is essentially the same as that set forth in

Shields v. Barrow, 58 US (17 How.) 130, 139 (1855). It is respectfully submitted that Shields and its progency Rave had great impact on the state and federal courts for a century but the case has been quietly demoted by certain language of the Provident opinion and the addition of other factors in on Rule 19. It is the present extent of this demotion not explicit in the cases, which has surprised the petitioner.

If William J. Bennett, United States Secretary of Education is not an indispensable party and if that decision is not "jurisdictional" as opposed to discretionary, then this Court should so state this legal issue. The Supreme Court of California has not overruled Kraus v. Willow Park Public Golf Course, 73 CA 3d 354, 367, 368 (1st Dist., Div. 4, 1977), nor has it explicitly extended its reach yet it denied petitioners writs almost

with what seemed to be an automatic reaction. This Court has not explicitly gone beyond Provident in an opinion but it is respectfully submitted public opinion apparently has been cultivated by implicit rulings to cause the Supreme Court of California to do what it did in this case. Where is candidness? Such a holding is a greatly expanded judicial power in both the state and federal courts. The petitioner is placed in an even more uncomfortable position because he referred to this "process" in the California Court of Appeal as a power-grab. an apology from the petitioner to the court of appeal is in order if the law is what it appears to be. By the decision of the Supreme Court of California the Court of Appeal could not cite opinions for their action because there are none in point in publication.

Where a state statute, such as California Code of Civil Procedure § 389,

incorporates federal law (Rule 19) by reference, the Supreme Court may review a state court decision as to that statute, pass on the federal question that is incorporated by reference, and remand for the state court to reconsider its interpretation of the underlying federal law. Standard Oil Co. of California v. Johnson, 316 US 481 (1942); cf. St. Martin Evangelical Lutheran Church v. South Dakota, 451 US 772, 780 (1981); State Tax Comm'n v. Van Cott, 306 US 511 (1959). See also United Air Lines v. Mahin, 410 US 623, 630-631 (1973).

In addressing the subject of prejudice, the Internal Revenue Service is currently making nonjudicial seizures of persons in default of student loans at the behest of the Department of Education. Prejudice of those already parties is related to Rule 19(a)(2)(ii). This rule requires a substantial risk of subsequent

litigation. It is respectfully submitted the United States government determines the risk of subsequent litigation at its whim. Relevant concerns are how successful new nonjudicial measures are and what is the public's perception as to the governments diligence in collecting debts and enforcing the law. Is this the process which is due under The Due Process Clause for the orderly administraton of justice for perhaps 10,000,000 student loan defaulters?

Revised subdivision (c), like its original counterpart, is normally limited to conditionally necessary parties since the court cannot proceed to judgment in the absence of an indispersable party. In this case, Code of Civil Procedure § 389(c) did not exist because the plaintiff consistently sought sanctions to punish the petitioner for raising the issue. The obvious reason being to keep such

"distasteful" litigation in the state courts where private attorney's fees are possible. It is respectfully submitted that the absence in the complaint of William J. Bennett, United States Secretary of Education is fraudulent and, in part, responsible for the reception of petitioner's defense in this case.

It should be noted:

> "Joint obligees ... usually have been held indispensable parties and this nonjoinder has led to a dismissal of the actions. Courts taking this position generally have reasoned that the duty or promise was made to the obligees jointly, not separately, and that mandatory joinder is justified." 7 C. Wright and A. Miller, Federal Practice and Procedure, Civil § 1613. (filed 1972).

It should also be noted:

> "While the question of whether to proceed in actions against officers of the United States has been characterized as jurisdictional, it is to be noted that in cases in which relief is directed at the United States, dismissed for failure to join the United States would be

> required as well under the indispensable parties doctrine." 3A Moore's Federal Practice 19.15 (2d ed. 1973).

And finally, there is a Ninth Circuit case, which in petitioner's view is not necessary to petitioner's case, but it is instructive. The defense of failure to join an indispensable party cannot be waived. Mc Shan v. Sherrill, 283 F 2d 462 (9th Cir. 1960).

IV

Sanction for bad faith "actions and tactics" under California Code of Civil Procedure § 128.5 were imposed upon the petitioner for moving to join William J. Bennett, United States Secretary of Education as a plaintiff which is an infringement by a state court decision upon federal rights by means of intimidation which elicited the appropriate carry-over to a court supervised mandatory settlement conference.

It is established law that this Court is not finally concluded by the state court's determination as to the sufficiency of pleadings asserting a federal right. According to Ellis v. Dixon, 349 US 458, 463 (1955), this Court has not definitely resolved whether it will follow a line of cases exemplified by American Railway Express Co. v. Levee, 263 US 19, 21 (1923) or Boyd v. Nebraska ex rel. Thayer, 143 US 135, 180 (1892) as to the scope of review it will undertake. It is respectfully submitted that a de nova determination is most appropriate where intimidation has been exercised to deny and chill federal rights by means of sanctions based upon a frivolous motion. Further intimidation flows from the sanctions to allow a cover up of the appeal of the earlier sanctions by means of a court supervised mandatory settlement conference.

The Supreme Court of California has stated, in regard to attorney contempt, that considerable summary power was vested in judges, which, if not wisely exercised, can readily become an instrument of oppression. Gallagher v. Municipal Court, 31 C 2d 784, 794 (1948). The new punitive measure of sanctions imposed in this case did not result from disobedience on intemperate behavior which is the subject of contempt. It resulted from bringing a motion to join a party - an indispensable party. The Municipal Court saw to it that no court reporter was present as requested when the sanctions were imposed. Simultaneously it denied a motion for joinder as plaintiff of William J. Bennett, United States Secretary of Education. This was oppression per se with alarming repercussions on federal law.

The Supreme Court of California's decision not to deal with the imposition

of sanctions in this case is a "mere evasion." See Rogers v. Alabama, 192 US 226, 230-231 (1904). Of course, two intermediate courts also decided not to become involved. It is respectfully submitted that there has been a discriminatory application of state court rules resulting in an evasion of the federal claim Hartford Life Ins. Co. v. Johnson, 249 US 490, 493 (1919); Wolfe v. Carolina, 364 US 177, 195 (1960).

The state court cannot deprive a litigant of a federal right by omitting to pass upon basic questions of fact. In that situation the Supreme Court will examine the record itself to determine "what facts reasonably might be and presumably would be found therefrom by the state court." Brooklyn Savings Bank v. O'Neil, 324 US 697, 703 (1945) Merchants Nat. Bank v. Richmond, 256 US 635, 638 (1921); Carlson v. Washington, 234 US 103,

105 (1914). California has provision for a statement of decision which is meant to demonstrate the factual and legal basis as to each principal controverted issue at trial. Any omissions or ambiguity brought to the court's attention will not favor the prevailing party on appeal. California Code of Civil Procedure §§ 632, 634. If properly utilized in this case these provisions require detailing of the role of federal law in the judicial decision and any evasion is highlighted. It is respectfully submitted the Superior Court totally ignored the requirements for a statement of decision and thereby contributed to the suppression of federal law in this case. See Radio Station WOW, doc. v. Johnson, 326 US 120 (1945). State procedural requirements not regularly followed cannot deprive this court of the right to review Barr v City of Columbia, 378 US 146, 149 (1964). Equally signifi-

cant was the absence of a court reporter as required by local rule to record the results of a mandatory settlement conference. Federal question jurisdiction is not lost or revoked by the fact that the court ultimately avoids or declines to decide the federal questions. See, e.g., Anderson v. Maryland, 427 US 463, 469 n. 4 (1976). The petitioner has consistently implied this fact by his spotlighting the absence of the word federal by any of the four levels of state court's involved herein. There is no doubt that petitioner's motion for further bill of particulars, directly raising federal questions in the principal case, was decided by use of a state rule which merely granted discretion to the court not to entertain the claim, thereby allowing their court to review the federal issues, Sullivan v. Little Hunting Park, Inc., 396 US 229, 233-234 (1969). And see Parrott

v. City of Tallahassee, 381 US 129 (1965). The evasion by the state court's commenced there and continues to this time.

CONCLUSION

For these reasons, this petition for certiorari should be granted. If the petitioner is correct in urging that William J. bennett, United States Secretary of Education is indispensable to further proceedings in this case, this Court should remand this matter to the Supreme Court of California for full treatment of the federal questions evaded by misuse of state procedural rules. A declaratory relief action addressing the wide variety of federal questions presented under the National Defense Student Loan Program is also needed. Following the performance of these prerequisites, the case can proceed in the merits. The ruse of a Judge making an offer during a

mandatory settlement conference, which no reasonable attorney could refuse in order to avoid litigation expense, should not be allowed to further suppress federal law. Attorney fees in the premises are appropriate.

APPENDIX

A. Summary Order of the Supreme Court of California

B. Summary Opinion of the Court of Appeal fo California, Fourth Appellate District, Division One

C. Minute Order and Subsequent Judgment of the Superior Court of California, County of San Diego

D. Order Directing Issuance of Alternative Writ of Prohibition and/or Mandate and/or writ of certiorari; alternative writ of prohibition and/or mandate and/or writ of certiorari

E. Decisions of the Municipal Cort of California, County of San Diego, San Diego Judicial District

F. Constitutional Provision, Statutes and Regulations Involved

G. Notice of Motion for Further Bill of Particulars and to Preclude Evidence Filed May 30, 1985

H. Declaration of Robert John Brady in support of Motion to file Compulsory Cross-complaint and to Remove Case from Civil Active List Filed July 5, 1985

I. Memorandum of Points and Authorities in Support of Motion for Order Compelling Joinder

J. Request for Statement of Decision, superior Court of California, Filed January 14, 1985

K. An Excerpt, Item 5(a) and (b), pp. 14-16, of the Petition for Writ of Prohibition and/or Mandamus and/or Writ of Certiorari or Other Relief with Memorandum of Points and Authorities in the Court of appeal fo the State of California, Fourth Appellate District, Division One Filed February 4, 1986

L. An Excerpt, Item II, pp. 53-55, of the Petition for Writ of Prohibition

and/or Mandamus and/or Writ of Certiorari or Other Relief with Memorandum of Points and Authorities in the Supreme Court of the State of California Filed February 28, 1986

ORDER DENYING ALTERNATIVE WRIT

L.A. NO. 32160

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Brady, Petitioner

v.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT ET AL.
Respondents
U.S. INTERNATIONAL UNIVERSITY ET AL.,
Real Parties in Interest

Application for Stay DENIED.

Petition for writ of prohibition/mandate DENIED.

____Bird_____
Chief Justice

SUPREME COURT
FILED March 12, 1986
Laurence P. Gill, Clerk

_____
Deputy

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

ROBERT JOHN BRADY, Petitioner

v.

SUPERIOR COURT, etc., COUNTY OF SAN DIEGO,

Respondent;

NO. D004173

Superior Court 553696

UNITED STATES INTERNATIONAL UNIVERSITY et al.,

THE COURT:

The petition for writ of mandamus or prohibition or certiorari has been read and considered by Justices Butler, Work and Lewis. The petition is denied as there is no showing any relief is warranted.

_____Butler_____
Acting Presiding Justice

Copies to all parties

Filed
Keenan G. Casady
Clerk
Feb. 18, 1986

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

ROBERT JOHN BRADY,
Petitioner

v.

MUNICIPAL COURT FOR THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

Respondent

CASE NO. 553696

ORDER AFTER HEARING: DENIAL OF WRITS

UNITED STATES INTERNATIONAL UNIVERSITY,

MULLIGAN, EZELL & SAYRE,

Real Parties in Interest

Petitioner ROBERT J. BRADY'S Petition for Writs of Mandate, prohibition and/or Certiorari came on regulary for hearing on January 16, 1986 at 9:00 a.m. in Department 35 of the Suprior Court of the State of California, County of San Diego, the Honorable Mack P. Lovett, Judge, presiding. Present were Petitioner ROBERT J. BRADY, in pro per, and CYNTHIA E. EZELL,

Mulligan, Ezell & Sayre, attorneys for Real Party in Interest, UNITED STATES INTERNATIONAL UNIVERSITY.

The Court having considered the petition and documents in support thereof, and in opposition to the writ, having heard the arguments of Petitioner and Counsel denied the petition of ROBERT J. BRADY for Writs of Mandate, Prohibition and/or Certioari.

IT IS THEREFORE ORDERED that the stay ordered against Respondent MUNICIPAL COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT be lifted as of the date of this order.

Dated: March 27, 1986

JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM

ROBERT J. BRADY, PETITIONER
IN PRO PER.

Filed
Robert D. Zumwalt, Clerk
March 27, 1986
By: C. Lewis

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

No. 553696

Court convened at: 9:00 a.m.

Reporter: Don manning

Clerk: Nellie Pernicano

Date: Thursday, January 16, 1986

Judge: Mack P. Lovett Dept. 35

Defendant/Respondent: Municipal Court for the State of Calif., Co. of S.D., et al

Attorney for Defendant/Respondent: Cynthia Ezell (Real Party in Interest USIU)

PLTFS Alternative Writ of Prohibition and/or Mandate and/or Writ of Certiorari.

DENIED - Court finds no abuse of discretion

ROBERT JOHN BRADY
Attorney at Law
950 West Muirlands Drive
La Jolla, California 92037
(619) 459-6125

Attorney in Propria Persona

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

ROBERT JOHN BRADY,

Petitioner,

553696

v.

MUNICIPAL COURT FOR THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, SAN DIEGO JUCICIAL DISTRICT,

Respondent

UNITED STATES INTERNATIONAL UNIVERSITY,

MULLIGAN, EZELL & SAYRE,

Real Parties in Interest

ORDER DIRECTING ISSUANCE OF ALTERNATIVE WRIT OF PROHIBITION AND/OR MANDATE AND/OR WRIT OF CERTIORARI

Good cause appearing from the verified petition on file in this action,

IT IS ORDERED that an alternative writ of prohibition and/or mandate and/or writ of certiorari issue under the seal fo this Court directed to the Municipal Court for the State of California, County of San Diego, San Diego Judicial District, respondent in this action, commanding it immediately on receipt of the alternative writ, to desist and refrain from taking any action or further proceedings in that action entitled United States International University v. Robert J. Brady, and Does I Through V, Inclusive, No. 335178, xcept to vacate your minutes of October 23, 1985, setting the terms of settlement and to reinstate the appeal of your sanctions imposed September 10, 1985, until furtherorder of this Court, and further commanding it to show cause before this Court on January 16, 1986, at 9:00 a.m., in the courtroom of Department 35 of Superior Court, at the Courthouse, 220

West Broadway, City of San Diego, California, why it should not be permanently restrained and prohibited from taking any further proceedings in that action except to vacate the above-mentioned minutes and reinstate the above-mentioned appeal.

IT IS FURTHER ORDERED that a copy of the alternative writ of prohibition and/or mandate and/or writ of certiorari be served at least 15 days bfore the hearig on the above order to show cause.

Dated: Nov. 25, 1985.

ARTHUR W. JONES
Judge of Superior Court

Filed
Nov. 25, 1985
By P. Burke Jennings

ROBERT JOHN BRADY
Attorney at Law
9250 West Muirlands Drive
La Jolla, California 92037
619/459-6125

Attorney in Propria Persona

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

ROBERT JOHN BRADY,

Petitioner, CASE NO. 553696

v.

MUNICIPAL COURT FOR THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO SAN DIEGO JUDICIAL DISTRICT,

Respondent

UNITED STATES INTERNATIONAL UNIVERSITY

MULLIGAN, EZELL & SAYRE,

Real Parties in Interest

ALTERNATIVE WRIT OF PROHIBITION AND/OR

MANDATE AND/OR WRIT OF CERTIORARI

THE PEOPLE OF THE STATE OF CALIFORNIA TO RESPONDENT MUNICIPAL COURT FOR THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT:

It appears from the verified petition on file in this action, that, in exercise of judicial functions in the action now pending before you entitled United States International University v. Robert J. Brady, and Does I Through V, Inclusive, No. 335178, you have made orders and directed that actions be taken in excess of your jurisdiction and in abuse of your discretion, and that you intend to continue to abuse your discretion and exceed your jurisdiction, and that petitioner, the party benefically interested, has no right to appeal nor any other plain, speedy, or adequate remedy in the ordinary course of law.

IN THE ALTERNATIVE, to certify and return to this Court a full, true and complete transcript of the record and proceedings in such action, including your minutes of October 23, 1985, setting the terms of settlement, and to show cause before this Court on January 16, 1986, at

9:00, in the courtroom of Department 35 of Superior Court, at the Courthouse, 220 West Broadway, City of San Diego, California, why you have not done so and why you should not be permanently restrained and prohibited from taking any further proceedings in such action, except to vacate the above minutes and to reinstate the above appeal.

YOU ARE FURTHER COMMANDED to desist and refrain from any furthr action or proceedings in the matter now pending before you, except to vacate the above-mentioned minutes and reinstate the above-mentioned appeal, until further order of this Court.

Dated: Nov. 25, 1985

ARTHUR W. JONES

By P. Burke Jennings
Deputy Clerk

Filed
Robert Zumwalt
Nov. 25, 1985
By P. Burke Jennings

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SAN DIEGO JUDICIAL DISTRICT

Department One convened at 10:30 a.m. on 11-6-85, Hon. E. Mac Amos, Jr., Judge: Ray Sorensen, Deputy Clerk; and the following proceedings were had:

UNITED STATES INTERNATIONAL UNIVERSITY

V.

CASE NO. 335178

ROBERT J. BRADY

THE PLAINTIFF APPEARS BY: CYNTHIA EZELL

The Defendant appears by: IN PRO PER

Counsel for Plaintiff indicates that Defendant has refused to execute full and mutual release.

Defendant contends this not the type of release he agreed to execute.

Court takes no action. Plaintiff advised to file Motion to Enforce Judgment.

E. Mac Amos, Jr.
res

CIVIL EX-PARTE MINUTES

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
SAN DIEGO JUDICIAL DISTRICT
County Courthouse, San Diego, CA 92101-3877

Civil Proceedings Dept. Convened at 3:00 p.m., Oct. 23

CASE NO. 335178

TITLE: U.S.I.U. (Cynthia Ezell) vs. ROBERT BRADY (ROBERT BRADY, ATTY IN PRO PER JURY & REPORTER

DISPOSITION

OCTOBER 23, 1985

For the Plaintiff: CYNTHIA EZELL

For the Defendant: ROBERT BRADY

[ ] Continued to _____ at_____

m., for settlement conference.

SETTLED: 1) DEFENDANT TO PAY TO PLAINTIFF $600.00 WITHIN 30 DAYS. PAYMENT INCLUDES SANCTIONS.
2) DEFENDANT WILL DISMISS APPEAL.
3) FULL AND MUTUAL RELEASES TO BE EXCHANGED BETWEEN THE PARTIES.
COUNSEL FOR PLAINTIFF TO PREPARE FORMAL ORDER.

E. MAC AMOS, JR.
res

Filed
Nov. 22, 1985
D. Kent Pedersen, Clark/Ad Officer

CIVIL SETTLEMENT CONFERENCE MINUTE SHEETS

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
SAN DIEGO JUDICIAL DISTRICT
220 W. Broadwy, San Diego, California 92101-3877

Civil Proceedings Dept. One
Convened at 9:00 a.m. on Sept. 10, 1985
Hon. E. Mac Amos Jr., Judge; R. Sorensen, Deputy Clerk.

CYNTHIA E. EZELL
2555 Camino Del Rio South Ste. 209
San Diego, CA 92108

Case No. 335178

Title: UNITED STATES INTERNATIONAL UNIVERSITY vs.

ROBERT J. BRADY

ROBERT JOHN BRADY
950 W. Muirlands Drive
La Jolla, CA 92037

NATURE OF PROCEEDINGS

BY DEFENDANT

MOTION FOR ORDER COMPELLING JOINDER OF

WILLIAM J. BENNETT, UNITED STATES

SECRETARY OF EDUCATION.....

DISPOSITION

September 10, 1985
For the Plaintiff: Cynthia E. Ezell
For the Defendant: In Pro Per

Motion for Order Compelling Joinder DENIED. Sanctions in the amount of $300.00 imposed against Defendant, due and payable within 30 dys. Settlement Conference Date set for 10-23-85 at 3:00 p.m. SEND NOTICES.

E. MAC AMOS, JR.
res

THE MUNICIPAL COURT
San Diego Judicial District
County Courthouse
220 W. Broadway
San Diego, CA 92101

August 5, 1985

Cynthia E. Ezell, Esq.
Mulligan, Ezell & Sayre
2555 Cmino Del Rio South
suite 209
San Diego, California 92108

Robert J. Brady
950 West Muirlands Drive
La Jolla, California 92037

RE: United States International
University v. Robert J. Brady
San Diego Municipal Court nO. 335178

The Court denies defendant's motion which was brought pursuant to CCP § 426.50 only as a compulsory cross-complaint. This is not a compulsory cross-complaint.

Further, the Court denies defendant's motion to remove this case from the civil active list.

Had this been brought under another section and granted, it is clear a motion to sever by plaintiff would be necessary in view of the nature of this cross-complaint.

Very truly yours,

JANET IDE KINTNER
Judge

MUNICIPAL COURT OF CALIFORNIA, SAN DIEGO
County Courthouse, San Diego, Calif 92101
San Diego Judicial District

CIVIL Proceedings Dept. One
Convened at 9:00 a.m. ON: July 31, 1985
Hon. JANET IDE KINTNER Judge P.Moons

CYNTHIA E. EZELL
2555 Camino Del Rio South
Suite 209
San Diego, CA 92108

CASE No. 335178
TITLE UNITED STATES INTERNATIONAL UNIV.
VS
ROBERT J. BRADY

ROBERT JOHN BRADY
950 WEST MUIRLANDS DRIVE
LA JOLLA, CA 92037

BY DEFENDANT
NATURE OF PROCEEDINGS

MOTION FOR LEAVE TO FILE COMPULSORY CROSS COMPLAINT AFTER ANSWER IS FILED AND TO REMOVE CASE FROM CIVIL ACTIVE LIST.

DISPOSITION

July 31, 1985
For the Plaintiff: Cynthia E. Ezell
For the Defendant: Robert J. Brady,
attorney in pro per
UNDER SUBMISSION

August 5, 1985
Court denies motion to file a compulsory cross-complaint and denies the motion to remove the case from the Civil Active list.

JANET IDE KINTNER

MUNICIPAL COURTOF CALIFORNIA, COUNTY OF SAN DIEGO
County Courthouse San Diego, Calif. 92101
San Diego Judicial District

CIVIL Proceedings Dept. ONE
Convened at 9:00 a.m. On June 25, 1985
Hon. JANET IDE KINTNER Judge P. Moon

CYNTHIA E. EZELL
2555 Camino Del Rio South, Ste. 209
San Diego, CA 92108

CASE NO. 335178

TITLE UNITED STATES INTERNATIONAL UNIV.
vs.
ROBERT J. BRADY

ROBERT J. BRADY
950 W. Muirlands Drive
La Jolla, CA 92037

BY DEFENDANT

NATURE OF PROCEEDINGS
MOTION FOR FURTHER BILL OF PARTICULARS DENIED

MOTION TO PRECLUDE EVIDENCE DENIED

DISPOSITION
June 25, 1985

Plaintiff appearing by cynthia e. Ezell
Defendant appearing in Pro Per

MOTION FOR FURTHER BILL OF PARTICULARS DENIED; untimely.
MOTION TO PRECLUDE EVIDENCE DENIED; untimely.

Janet Ide Kintner, anc
MINUTES AND NOTICE OF RULING - LAW AND MOTION

CONSTITUTIONAL PROVISIONS

Article VI

Clause [2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. (No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.)

STATUTES

§ 425(b)(2)(F), Term of Loan

(F) The institution may provide, in accordance with regulations of the Commissioner, that during the repayment period of the loan payments of principal and interest by the borrower with respect to all the outstanding loans made to him from loan funds established pursuant to this subchapter shall be at a rate equal to not less than $15 per month.

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by

the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

§1356 Seizures not within admiralty and maritime jurisdiction

The district courts shall have original jurisiction exclusive of the courts of the States of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

§1507 Judicial notice

The contents of the Federal Register shall be judicially notice and without prejudice to any other mode of citation, may be cite by volume and page number.

§ 128.5 Frivolous actons or delaying tactics; order for payment of expenses

(a) Every trial court may order a party ... the party's attorney, or both ... to pay any reasonable expenses, inclusind attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay ... This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section .

(2) "Frivolous" means (A) totally and completely without merit or (B) for the

sole purpose of harassing an opposing party

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purviw of this section.

§ 389 Joinder as party, conditions; indispensable person, factors; statement of reasons for nonjoinder; class actions

(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the

subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

(b) If a person as described in paragrah (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without

prejudice, the absent person being thus regarded as indispensable. the factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoiner.

(c) A complaint or cross-complaint shall state the names, if known to the pleader, of any persons as described in paragraph (1) or (2) of subdivision (a) who are not joined, and the reasons why they are not joined.

(d) Nothing in this section affects

the law applicable to class actions.

§ 632 Statement of decision

In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required .... Upon the request of any party appearing at the trial, made within 10 days after the court announces a tentative decision, or if the trial has, lasted less than one day, made prior to submission of the matter for decision, the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested such a statement, any party may make proposals as

to the content of the statement of decision.

The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial has been completed within one day, the statement of decision may be made orally on the record in the presence of the parties.

§ 634 Omission or ambiguity brought to attention of trial court; inference

When ... a statement of decision does not resolve a controverted issue, or if the statement is ambiguous ... and the record shows that ... the omission ... or ambiguity ... was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial

court ... decided in favor of the prevailing party as to ... those facts or on ... that issue.

§ 464(c)(1)(C) Term of Loan

(c)(1) Any agreement between an institution and a student for a loan from a student loan fund assisted under this part --

(C) may provide, at the option of the institution in accordance with regulations of the Commissioner, that during the repayment period of the loan, payments of principal and interest by the borrower with respect to all outstanding loans made to him from student loan funds assisted under this part shall be at a rate equal to not less than $30 per month;

REGULATIONS

34 CFR 674.2 Definitions

Default or in default: (a) The failure of a borrower to --

(1) Make an installment payment when due; or

(2) Comply with other terms of the promissory note.

(b) Notwithstanding paragraph (a), if the institution reasonably concludes from written contacts with the borrower that he or she intends to repay the loan, the borrower is not considered in default.

(c) The Secretary considers a loan discharged in bankruptcy not to be in default.

Default rate: Represented as a fraction:

$$\frac{\text{Defaulted principal amount outstanding}}{\text{Matured loans}}$$

Defaulted principal amount outstanding: The total amount borrowed that has reached the repayment stage mius any principal amount repaid or canceled on loans --

(a) Repayable monthly and in default at least 120 days; and

(b) Repayable less frequently and in default at least 180 days.

Defense loan. a loan made before July 1, 1972, under Title II of the National Defense Education Act (20 U.S.C. 421-249).

34 CFR 674.32 (d) Term of Loan

(d) Minimum rates of repayment -- deferments. (1) The promissory note may, at the option of the institution state that the monthly repayments may vary according to the minimum monthly repayment provision (see § 674.33).

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a

party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other mesures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder.

A pleading asserting a claim for relief shall state the names, if known to the leader, of any persons as prescribed in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. this rule is subject to the provisions of Rule 23.

NOTICE OF MOTION FOR FURTHER BILL OF PARTICULARS AND TO PRECLUDE EVIDENCE FILED MAY 30, 1985

(1) A federal question appears to exist under the miinimum repayment rates under Federal law of $15.00 and $30.00 provided for in 20 USC Sec. 1087 dd (c) (1) (C)....

(2) A federal question appers to exist in regard to the acceleration of a loan under federal law as to what constitutes acceleration. 34 CFR Sec. 674.44(a) (3) (B) (v) Jan. 19, 1981)....

(3) A federal question appears to exist as to the definition of default and the defaulted principal amount outstanding at all pertinent periods. See 34 CFR Sec. 674.2....

(4) Under 20 USC and 34 CFR there are a variety of provisions pertaining to insurance, collateralization, assignment

and sale of student loans in a student loan fund or elsewhere....

(5) Federal interest subsidy payments under 20 USC Sec. 1078 and related provisions ostensibly apply to the promissory note attached as "Exhibit A" in the plaintiff's complaint and bill of particulars....

(6) Disclosures to the borrower are a vital requirement under 20 USC Sec. 1087 cc-1....

DECLARATION OF ROBERT JOHN BRADY IN SUPPORT OF MOTION TO FILE COMPULSORY CROSS-COMPLAINT AND TO REMOVE CASE FROM CIVIL ACTIVE LIST

Filed July 5, 1985

... It is defendant's understanding that at least ninety per cent (90%) of the funds loaned to students under the Department of Education program involved in the

instant complaint are supplied by the Federal government under the auspices and supervision of the Department of Education. The property allegedly involved in plaintiff's complaint and the controversy which is apparent in subsequent documents demonstrates that the cause of action for declaratory relief in the cross complaint asserts an interest in the same property and the same controversy.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDER COMPELLING JOINDER OF WILLIAM J. BENNETT, UNITED STATES SECRETARY OF EDUCATION Filed August 16, 1985.

... Under Western Union Telegraph Co. v. Commonwealth of Pennsylvania, 368 US 71 (1961), no court can render a judgment affecting property to which conflicting claims are made unless it can do so in such a way as to bind all significant

claimants to the property. And no court can render judgment binding on persons who are claimants to property unless the property is "before" the court. No judgment affecting\ property is valid against anyone unless it is rendered by a court of which it can be said with substantial certainty that it has the property "before" it....

...As this case explains, a third party creditor beneficiary can sue either the promissor or the promisee or may join them and obtain judgment against both. Nonetheless, if the effect of fragmented ajudications is to subject a defendant to the risk of paying the same debt more thanonce, there would be a taking without due process. Western Union Telegraph Co. v. Commonwealth of Pennsylvania, 368 US 71, 77 (1961)....

REQUEST FOR STATEMENT OF DECISION Filed

January 14, 1986

(1) ... In this case federal law and the United States Secretary of Education are vital to the case and their absence has caused a series of proceedings which culminated in sanctions of the petitioner which were followed in the lower Court by a coerced abandonment of the appeal of the sanctions os part of a mandatory settlement conference by the Respondent Court which lacked jurisdiction of the subject matter....

(7) Enforcement of state and federal statutes and regulations is by mandamus....

(18) ... Petitioner's position is such jurisdiction is absent in the Respondent Court without the United States Secretary of Education as a party. Sanctions inthe Respondent Court were wrongly imposed

in this context when the petitioner was attempting to demonstrate the federal nature of the cause of action at every opportunity in that court to preserve his rights....

(21) The validity of CCP Sec. 430.80 is challenged s an invalid statute under the Fourteenth Amendment to the United States Constitution if it provides for waiver for non-joinder of a party not raised by demurrer or answer. The Respondent Court denied the petitioner a fair opportunity for amendmwnt in the circumstances of this case.

(35) The Supremacy Clause of the United States Constitution compels a state to enforce federal statutes such as the federal student loan program.

(58) Article I, Section 10, Clause 1 of the United States Constitution restricts states from impairing the obligation of contracts. The federal government

is not so restricted and by its action in 1972, it raised the minimum monthly payments on student loan conracts to $30 which directly affects the subject matter before the Respondent Court.

(70) William J. Bennett, United States Secretary of Education has a financial interest, a substantial financial interest, in the promissory note which is the subject of the action in Respondent Court as a matter of law or, in the alternative, as a matter of fact.

(71) If it is not feasible to join the United States, the United States is to be regarded as an indispensable party under CCP Sec. 389 (b) and the action dismissed.

(72) The status of the United States as an absent party is indispensable based upon the nature and extent to which interests of parties will be affected by its actions as well as by the relief sought between the parties.

(76) The motion for order compelling joinder of William J. Bennett, United States Secretary of Education filed Agust 16, 1985 stated in the Declaration at p. 3, lines 6-13.

> "For the Court to make a determination under Section 389 of the Code of Civil Procedure, an analysis is required which if done summarily, would leave an appellate court guessing and require a federal court to look ehind the order. Without a court reporter present at the hearing of motions, as is the Presiding Judge's practice, the defendant is truly hampered in making a record in this case which will allow a fair appeal. a summary decision only obfuscates the matter. A court reporter is requested at the hearing of this matter...."

(80) The Memorandum of Points and authorities in Support of Motion for Order Compelling joinder of william J. Bennett, United States Secretary of Education filed August 16, 1985, p. 12, lines 6-8 states: "The United States has a pecuniary interest in the cause of action - this

interest is overwhelming and determinative of the jurisdictional issue of joinder." This statement was true then and is true now and is the bottom line in the plaintiff's cause of action which has been consistently ignored by the Respondent Court and the plaintiff in violation of the petitioner's 14th Amendment rights under the United States Constitution.

(86) CCP Sec. 389 is challenged s unconstitutional under the 14th Amendment to the United States Constitution if it can be interpreted to allow this action to proceed without the United States as a party.

(90) Regulations of the federal government require supervision and direction by the Department of Education of lending institutions in the federal student loan program. By joinder of the United States this highly relevant information would be available in reliable form

for the 15 year period involved in the matter before the Respondent Court. Without it, the petitioner is allowed one deposition to discover events over a 15 year period. Prejudice for nonjoinder and delay to the petitioner and the resulting injustice make for an unfair trial.

COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE, NO. DOO4173, PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS AND/OR WRIT OF CERTIORARI OR OTHER RELIEF Filed February 4, 1986.

(5) ... The judgment and action threatened to be taken by the Municipal Court are without or are in excess of the jurisdiction of either of the respondents, nd in violation of constitutional, statutory and precential mandates such as Article VI, Section 2 of the United States

Constitution, the Fourteenth Amendment to the United States Constitution, CCP Sec. 389.

The many cases and statutes which the petitioner has sought judicial notice of are relevant in consideration of the actionthreatened. Judicial notice was requested: 1) May 30, 1985 (375-376); 2) July 5, 1985 (344-345); 3) August 16, 1985 (151-315); November 25, 1985 (501-504); and on January 14, 1986. Additionally, 1judicial notice was sought on two other occasions: (441:13-16, 429:23-27). this Court is now asked to judically notice this materiall under Evidence code Secs. 450-460. With one exceptionwhich is not on the record and was apped with sanctions, judicial notice has not occurred in this case!

(b) ...Nowithstanding the plainduty imposed on respondent Municipal Court and respondent Suprior Court by law, and

notwithstanding the demand of petitioner that respondents perform such duty as set forth at (362-377) in a motion for further bill of particulars, or as set forth at (332-346) in a motion to file a crosscomplaint, or as set forth at (129-315) in a motion compellingjoinder, ora as set forth at (554-555, 428-445) in a petition for multiple extraordinary relief and statement of decision relting thereto, respondents have wrongly failed and refused to enforce federal laws and regulations as requested by petitioner. a coercive and illegal mandatory settlement conference does not serve to waive such requests. Unless compelled by this Court to do these acts required by law, respondent Courts will continue to fall and refuse to do so....

SUPREME COURT OF CALIFORNIA, PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS AND/OR WRIT OF CERTORIARI OR OTHER RELIEF, NO. L.A. 32160, FILED FEBRUARY 28, 1986.

II

JURISDICTIONOF SUBJECT MATTER - INDISPENSABLE PARTY

Basically, as amended, Section 389 of the Code of Civil Procedure requires joinder of persons materially intrested in an action whenever feasible. (Commission Comment). With one minor change (the addition of "without prejudice" to subdivision (b), revised CCP Sec. 389 is virtuall ientical with Federl Rule of civil Procedure 19.

The United States is a person described in Rule 19 (a) (1), (2). Carlson v. Tulalip Tribes of Washington, 510 F. 2d 1337 (9th Cir. 1975). If the United States is found to be an

indispensable party defendant, the action must be dismissed if the United States has not waiived its immunity from suit. Mine-Safety Appliance Co. v. Forrestal, 326 US 371 (1945). A proceeding against property in which the United Stated has an interest is a suit against the United States. Minnesota v. United States, 305 US 382 (1939).

> "Joint obligees usually have been held indispensable parties and their nonjoinder has led to dismissal of the action. Courts taking this position generally have reasoned that the duty or promise was made to obligees jointly, not separately, and the mandatory joinder is justified." 7 Wright & Miller, Federal Practice and Procedure Sec. 1613, pp. 126-127.

...A subdivisionof Sec. 389 is of particular importance to student loan litgants. It has been the policy and practice of the San Diego Court system to overlook subsection (c) of this statute which has been consistently acquiesced to

by the United States. This is the provision which states that the plaintiff must join all persons necessary to a just adjudication. If such persons are not joined, the complaint must state their names (if known), and the reasons by they have not been joined. CCP Sec. 389 (c). The petitioner has consistently been opposed in this efforts to seek truth in pleading in this case - such oppositionis fraudulent and purchased with state court attorney's fees. If the United States was indicated as such a party, removal would be the next locial step and one that likely cause the plaintiff's atorney his expected fees. It is respectfully submitted that this Court compare the language of CCP Sec. 389 (c) to the broad proclamations of Halper and note the conflict.

This case involves a deliberate attempt by the plaintiff to avoid

mention of the fact that it has brought a federal cause of action in which William J. Bennett, United States Secretary of Education is an indispensable party. The terms of Sec. 389 are explicit on the point. Because the plaintiff did not wish removal to federal court (28 USC Sec. 1442), the true nature of the case was subverted to ignore some 150 pages of federal law and regulations on National Defense Student Loans. All Courts to this one have supported this subversion. The record contains motions for further bill of particulars, cross-complaint for declaratory relief and for joinder all of which were directed to acknowledgment of the federal cause of action and all of which denied. Sanctions were imposed for bringing the joinder motion! The Superior Court affirmed these actions on January 16, 1986 and the Court of Appeal did so on February 18, 1986. What is happening here?